



June 5, 2019

Submitted via Electronic Comment Filing System

Ms. Marlene H. Dortch

Secretary

Federal Communications Commission

RE: Ex Parte Letter, CG Docket No. 17-59, WC Docket No. 17-97

I write to share the serious concerns of the Insights Association,¹ on behalf of the marketing research and data analytics industry, with the draft Declaratory Ruling² upon which the Federal Communications Commission (FCC) plans to vote at the June 6 open meeting.

The Insights Association supports the FCC's efforts to combat the scourge of illegal and fraudulent phone calls, which make consumers less likely to answer any call on their phone (including calls for marketing research). So we support the FCC's attempts to go after bad actors who pay no heed to the requirements and restrictions of law, such as the Telephone Consumer Protection Act (TCPA), nor to the best practices and codes and standards of industry bodies representing callers.³

As acknowledged in the Declaratory Ruling, the agency probably needs to consider more than just levying fines. For example, according to the Wall Street Journal, the FCC has levied \$208.4 million in fines for TCPA violations since 2015, of which only \$6,790 has been collected.⁴ Some of the problem will

¹ The Insights Association is the leading nonprofit association representing the marketing research and data analytics industry. Our members are the world's leading producers of intelligence, analytics and insights defining the needs, attitudes and behaviors of consumers, organizations and their employees, students and citizens. With that essential understanding, leaders can make intelligent decisions and deploy strategies and tactics to build trust, inspire innovation, realize the full potential of individuals and teams, and successfully create and promote products, services and ideas.

² Advanced Methods to Target and Eliminate Unlawful Robocalls, Draft Declaratory Ruling and Third Further Notice of Proposed Rulemaking, CG Docket No. 17-59, WC Docket No. 17-97, FCC-CIRC1906-01 (May 16, 2019). <https://docs.fcc.gov/public/attachments/DOC-357499A1.pdf>

³ Such as the Insights Association Code of Standards and Ethics for Marketing Research and Data Analytics <https://www.insightsassociation.org/issues-policies/insights-association-code-standards-and-ethics-market-research-and-data-analytics-0>

⁴ "The FCC Has Fined Robocallers \$208 Million. It's Collected \$6,790." By Sarah Krouse. The Wall Street Journal. March 28, 2019. <https://www.wsj.com/articles/the-fcc-has-fined-robocallers-208-million-its-collected-6-790-11553770803>

be alleviated by reforming TCPA to focus strictly on bad actors and fraudulent calls, which the Insights Association has long urged, and allowing FCC enforcement to focus on bad actors, without distraction.

Unfortunately, the FCC swings a broad brush. In the draft Declaratory Ruling and 3rd Further Notice of Proposed Rulemaking, for example, the FCC frequently used the terms “illegal call,” “unwanted call,” and “robocall” interchangeably, and without clear definitions. Of course, it may not matter, since the regulations proposed by the FCC do not reference blocking illegal calls or blocking robocalls – they simply reference the blocking of any calls. The Declaratory Ruling also notes several examples of call blocking programs “that may be effective and would be based on reasonable analytics designed to identify unwanted calls,” which include factors specific to telemarketing, such as calling numbers on the National Do Not Call Registry, and that make no sense in the context of non-telemarketing calls (only telemarketers are restricted from calling numbers on the registry). Much of the data suggested for analysis in call blocking has no relation to the potential legality or illegality of calls.

The Declaratory Ruling would clarify “that voice service providers may, as the default, block calls based on call analytics that target unwanted calls, as long as their customers are informed and have the opportunity to opt out of the blocking” and “that voice service providers may offer customers the option to block calls from any number that does not appear on a customer’s ‘white list’ or contacts list, on an opt-in basis.” The two programs are referred to as “call-blocking programs” and “whitelist programs.” The FCC encourages “voice service providers to offer these tools immediately to their customers, and where they already provide opt-in call-blocking programs, to make them the default for all consumers.”

The Declaratory Ruling would likely result in lawful calls for purposes of bona fide marketing research⁵ being presumptively and erroneously blocked by voice service providers across the United States, with the callers never even knowing they were blocked nor being given the opportunity to be unblocked. Similar calls from the same caller could potentially be blocked for different reasons even by the same provider, because voice service providers and third-party call blocking and labeling service providers ultimately follow the FCC’s approach of treating almost any call as unwanted.

The FCC acknowledges that the Insights Association (and other commenters) “argued that the Commission should require voice service providers to support some sort of white list,”⁶ but the FCC clearly followed the recommendations of activist group Consumers Union to dismiss the white list idea and instead require a “Critical Call List” that will be “limited to genuine emergency calls only.”

Although the FCC finds “that opt-out call-blocking programs are generally just and reasonable practices (not unjust and unreasonable practices) and enhancements of service (not impairments of service),” the

⁵ “Bona fide marketing research” is the collection and analysis of data regarding opinions, needs, awareness, knowledge, views, experiences or behaviors of a population, through the development and administration of surveys, interviews, focus groups, polls, observation, or other research methodologies, in which no sales, promotional or marketing efforts are involved and through which there is no attempt to influence a participant’s attitudes or behavior.

⁶ For example, as the Insights Association said in reply comments on July 31, 2017: “Whether the FCC chooses to establish a single white list for all providers, or to have providers keep their own white lists, voice service providers and call blocking service providers should be required to run origination numbers through that white list before blocking a number, and to regularly update both the white list and the numbers being blocked.”
<https://ecfsapi.fcc.gov/file/108010020309128/IA-Fcc-advanced-robocall-NPRMNOI-7-31-17.pdf>

Insights Association shares the worry raised by other commenters that the agency has exceeded its lawful authority in this Declaratory Ruling and is issuing rules that will cause confusion in the marketplace.⁷

The Declaratory Ruling includes an extremely limited economic impact assessment⁸ that accounts for the costs to voice service providers and (theoretically) consumers, but no assessment of the long-range impact on consumers, businesses, organizations and governments from the impairment of insights production through telephone research. The FCC expects that the declaratory ruling will “substantially reduce” costs to voice service providers and provide “more than \$3 billion annually” in benefit to consumers (an analysis that likely takes no account of the cost of potentially desired or necessary calls that will never be received). A similar approach can be found in the Initial Regulatory Flexibility Analysis, which accounts for the impact on small business in the telecommunications industry, but not small businesses among callers.

The key non-TCPA problems facing legitimate calling entities (such as bona fide marketing researchers) in the current telephone ecosystem include: (1) having calls blocked automatically; (2) calls being labeled (either by a voice service provider themselves, or by a blocking and labeling service) as “junk,” “spam,” “marketing,” and the like; and (3) never receiving notification that a call has been blocked or mis-labeled (including some apps and services delivering a busy signal or constant ring back to a calling entity when a call has in fact been blocked.) The draft Declaratory Ruling will only make worsen these problems, especially since the FCC rejected our white listing recommendation.

Should the FCC choose not to delay voting on the draft Declaratory Ruling on June 6, the Insights Association urges the agency to issue clear guidance for voice service providers to use in distinguishing between types of calls (something which we have previously noted⁹ does not even happen in the quarterly data releases from the FCC complaint file), promote national standards for informing voice service providers and callers if a lawful call has been blocked, and require voice service providers and

⁷ Ex Parte Letter from Mark W. Brennan (May 28, 2019), <https://ecfsapi.fcc.gov/file/105291072428619/2019-05-27%20Coalition%20Ex%20Parte%20Notice%20%5BFINAL%5D.pdf>, and Ex Parte Letter from Leah Dempsey of ACA International, (May 30, 2019), <https://ecfsapi.fcc.gov/file/10531830722517/ACA%20International%20-%20Ex%20parte%20Draft%20Declaratory%20Ruling.pdf>

⁸ “We believe that the benefit to consumers of voice service providers offering opt-out blocking services—which could potentially block billions of illegal or unwanted calls—will exceed any costs incurred. Indeed, we expect these blocking services will yield an overall reduction in costs incurred by voice service providers as illegal and unwanted calls will consume less of their network capacity, which can then be devoted more fully to calls and other services that consumers value.”

⁹ As explained in the Insights Association’s April 2018 Ex Parte letters: “Perhaps unintentionally, the FCC is helping to fuel the call blocking and tagging problem by releasing questionable complaint data every quarter. We respectfully request that the FCC reconsider these data dumps, or at least incorporate specific data for each call record, such that every call about which someone files a complaint does not get automatically added to every black list in the U.S. Particularly since illegal robocalls generally use spoofed caller ID, how many legitimate callers or run-of-the-mill phone subscribers are being inadvertently blacklisted when some scam artist briefly uses their numbers for a scam call campaign?” <https://ecfsapi.fcc.gov/file/104162415127688/IA-FCC-Bender-Susskind-ex-parte-4-16-18.pdf> and <https://ecfsapi.fcc.gov/file/1042090044601/IA-FCC-Litman-Martinez-ex-parte-4-20-18.pdf>

call blocking and labeling providers to offer useable mitigation and remediation options for lawful calls and callers subject to erroneous blocking.

Consumers obviously need help against scam calls and caller ID spoofing. Unfortunately, legitimate calls are already being blacklisted en masse, leading to marketing research calls being blocked or mislabeled as spam, with consumers and voters being deprived of their opportunity to confidentially share their concerns on policy issues, elections, products and services to improve the quality of life for all. Combining call blocking and labeling with the ongoing TCPA restrictions (which made legitimate calls to cell phones problematic without class actions from serial plaintiffs but resulting in little success combating scam callers) has lowered telephone survey response rates to an average of five percent, according to the Pew Research Center. Citizens often ask why they never get called for a survey; overreaching and misdirected attempts to protect them from almost any calls help explain why they're getting scammed instead of surveyed.

The Insights Association looks forward to working with the FCC in pursuit of consumer protection and a saner telephone ecosystem for both callers and call recipients.

Sincerely,

A handwritten signature in black ink, appearing to read "Howard Fienberg". The signature is stylized with a large, looping "H" and a cursive "Fienberg".

Howard Fienberg, CAE, PLC, PPC

VP Advocacy

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